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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAIRO BUSTAMANTE et al., Defendants and Appellants.	B280061 (Los Angeles County Super. Ct. No. BA390066)

APPEALS from judgments of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Conditionally reversed and remanded for further proceedings.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Jairo Bustamante.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Juan Solano.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Juan Solano (Solano) and Jairo Bustamante (Bustamante) were charged with the gang-related murder of Franklin Munoz (Munoz) on October 15, 2011 (the Munoz murder). Additionally, Bustamante was charged with the murder of Israel Salinas (Salinas) three days later on October 18, 2011 (the Salinas murder). At the time of the murders, Solano was 17 years old and Bustamante was 16 years old. Their trials were severed and juries found them guilty, as explained below. They were sentenced together.

On appeal, Bustamante contends his gang enhancement is inconsistent with his voluntary manslaughter conviction.

Solano contends the trial court prejudicially erred by (1) giving conflicting self-defense instructions, (2) allowing the prosecutor to elicit testimony that Bustamante was charged with the Salinas murder, and (3) allowing evidence that he was in possession of a firearm after the Munoz murder that matched the caliber of the murder weapon.

Both appellants also contend their judgments must be conditionally reversed and remanded to the juvenile court for a transfer hearing under Proposition 57 and for the trial court to exercise its discretion regarding their firearm enhancements in light of the passage of Senate Bill No. 620. We find no merit to appellants' substantive challenges to their convictions. However, we conditionally reverse and remand the case for further proceedings as discussed herein.

PROCEDURAL BACKGROUND

With respect to the Munoz murder, the jury found Solano guilty of first degree murder (Pen. Code, § 187, subd. (a)).[1] His jury found true the allegations that appellants and a principal personally and intentionally used and discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (c), (d), (e)(1)). The jury also found true the gang allegation (§ 186.22, subd. (b)(1)(C)). Solano was sentenced to a total term of 50 years to life in state prison, consisting of a term of 25 years to life for the first degree murder, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)).

With respect to the Munoz murder, the jury found Bustamante guilty of voluntary manslaughter and found true the gang allegation. With respect to the Salinas murder, the jury found Bustamante guilty of first degree murder and found true both the gang allegation and the allegations that he personally and intentionally discharged a firearm. Bustamante was sentenced to a total term of 66 years to life in state prison, consisting of 25 years to life for the first degree murder, plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), plus the midterm of six years for voluntary manslaughter, plus 10 years for the gang enhancement.

The juries found appellants not guilty of the attempted murder or attempted voluntary manslaughter of Gilbert Alvarez (Alvarez). We therefore omit the facts pertaining to these charges.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

SOLANO'S TRIAL

The Prosecution Case

Shortly after midnight on October 15, 2011, Vivian Figueroa (Figueroa) and her father picked up Alvarez and two of his new acquaintances, Munoz and his younger cousin. Munoz and Alvarez were 18th Street gang members. Munoz had gang tattoos on his body and Alvarez had gang tattoos on his face. They drove to Domino's Pizza in a minimall at Hollywood Boulevard and Gower Street in Hollywood. Alvarez ordered pizza, then returned to the car and stood next to it.

While he waited, what appeared to be a family of gang members approached from the street. Four men, including appellants, went up to the car, while two women with an infant stayed behind. Appellants are members of the Mara Salvatrucha (MS) gang, which is a rival of the 18th Street gang. One man said, "What the f*** are you doing here?" Someone replied, "What the f*** you think?" People were swearing, and gang names and signs were exchanged.

Munoz and his cousin got out of the car to join Alvarez. Solano and his companions pulled out guns. Munoz, who was unarmed, started to run away. Solano and the other men began to chase Munoz.

Solano and Bustamante were both armed. Solano fired two or three times at Munoz as he ran. Bustamante was shooting as well.

As Munoz fell to the ground, he put both hands in the air, as if to surrender. Solano looked around; then he went up to Munoz, who was lying several feet away. Solano stood over him and unloaded his gun, firing multiple rounds.[2]

Munoz was shot 10 times in the heart, abdomen, thighs, and buttocks. Solano's gun was a dark semiautomatic. Five of the bullets recovered from the coroner's office, and fragments of four other bullets found at the scene, came from the same gun. Of the 17 cartridge cases recovered, 12 were fired from the same gun and five were fired from a second gun. Both weapons were nine-millimeter handguns. The murder weapon was never recovered.

A few seconds after the gunfire stopped, Solano and Bustamante ran back through the parking lot and returned to their group. Solano said, "Let's get out of here." He and Bustamante escaped in a taxi.

Solano was arrested two months later on December 13, 2011. Police seized his cell phone, which contained a video showing him firing a nine-millimeter Beretta semiautomatic handgun.

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[2] At least four witnesses—including a pizza delivery driver, a limousine driver, a passerby in a vehicle and a pedestrian—testified that Munoz was unarmed and he was fired upon while running from the shooter. Three of these witnesses testified that Munoz was lying on the ground with his hands up when Solano fatally shot him.

The Defense Case[3]

Solano testified in his own defense. He was 17 years old and unarmed on the night of the Munoz murder. He went with Bustamante and other friends, including a woman pushing an infant in a stroller, to get pizza. He noticed an 18th Street gang member standing next to a car. The man approached Solano's group, made an 18th Street gang sign, and asked where they were from. Some of Solano's friends, possibly including Solano, responded with their own gang signs. The man said, "F*** Monkey Shits," a derogatory term for MS, and started running toward the group.

At that point, Munoz got out of the car. He crouched between some cars with a gun in his hand and crept toward Solano's group. Solano heard multiple gunshots. He panicked and ran for cover. Solano saw Munoz jogging in front of him. Bustamante was running behind Solano and to his left. Munoz looked over his shoulder. Solano continued to hear gunshots. He was in fear for his life as he ran, thinking that Munoz was shooting at him or at Bustamante. Solano turned around and saw Bustamante shoot at Munoz repeatedly. Bustamante continued to shoot after Munoz fell to the ground. Solano ran away and called his father, who picked him up. He was afraid his friends would think he was a coward for leaving.

Bustamante testified on Solano's behalf. They never intended to engage in gang activity the night of the Munoz murder, but someone ran up to their group and issued a gang challenge. Bustamante walked toward him. The man and

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[3] The defense also presented an eyewitness identification expert and a gang expert. Because their testimony is not at issue, we do not summarize it here.

Bustamante claimed allegiance to their respective neighborhoods. Then a second man got out of a car, standing as if to reach for something in his waistband. "Let's get down," he said. Bustamante had a gun in his own waistband. He heard gunshots and felt bullets flying. Bustamante pulled out his gun and fired back.

Munoz ran and Bustamante chased him, firing his gun as he ran behind Munoz. After Munoz fell, Bustamante kept shooting because he thought Munoz might get up and shoot back. Then Bustamante turned and ran back to his companions.

Bustamante never saw Munoz with a weapon. When questioned, he lied to the police because he was intimidated.

The Rebuttal Case

The prosecution played Bustamante's December 20, 2011, recorded statement to detectives about the Munoz murder. Bustamante stated that he heard the gunshots outside Domino's Pizza, and stayed there with the woman and baby until the police arrived. He did not see who was shooting. The "home girl" had a gun, and "the other fool had a gun, too." After the shooting, Bustamante told them, "[Y]'all fools f***ed up, ... How you fools gonna pull out a gun when we have a baby on our side . . . ?" He identified the two people in his group with guns as "Juan" and "Adriana." He stated that Juan chased the man who got shot.

Bustamante also gave a recorded statement about the Salinas murder, which was played for the jury. He stated that someone "banged on [him]" at school, challenging him to a fight. As he was walking home from school under a bridge, the man came up behind him and started taking off his shirt. "I thought he was going to swing, but he was actually popping out a gun." Bustamante charged at him, took the gun away and shot him. In

a second, recorded statement to detectives about the Salinas murder, Bustamante admitted that he lied about taking the gun away from the other man. "He took off his shirt. And he was ready to square up, . . . I just didn't think about it. And I just shot him."

BUSTAMANTE'S TRIAL[4]

The Munoz Murder

Bustamante, Solano, two other men, and two women, one with a stroller, were walking to Domino's Pizza, when Alvarez approached them with clenched fists and asked where they were from. Alvarez was an 18th Street gang member with gang tattoos on his chin. Alvarez threw up his hands and gestured. Bustamante said he was from MS. Alvarez said, "Oh, s***." Alvarez was unarmed. Solano asked, "Do you want a piece of me?" Words were exchanged that escalated to an argument.

Munoz, who was also an 18th Street gang member, got out of the car. He ran up to the group and joined the argument with his fists clenched. "What the f*** are you doing here?" he asked.

Bustamante and Solano both pulled out guns. One of them started shooting at Alvarez. Alvarez ran. Then Solano started chasing and shooting at Munoz. Bustamante also chased Munoz. Munoz was unarmed. Solano shot Munoz three to five times. Facing away from Solano, Munoz put up both hands as he fell to the ground. Solano approached him, looked around quickly, and shot Munoz numerous times.

The prosecution's gang expert testified that the MS and 18th Street gangs are long-time enemies. Bustamante and Solano are members of MS; Alvarez and Munoz belonged to the

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[4] Bustamante presented no witnesses in his defense.

18th Street gang. After Bustamante was arrested in October 2011, he got several gang tattoos while in custody. Prominent MS tattoos, like the ones Bustamante has, must be earned by committing crimes for the gang. Murder gains the most respect. The gang expert testified that in his opinion the Munoz murder was for the benefit of, at the direction of, or in association with the MS gang. He testified that the origin of the confrontation was clearly the "affiliation with their street gangs, their ties to their gang, their belief of what they feel they need to do to represent or fulfill the honor of this gang."

The Salinas Murder

On October 18, 2011, Gladys Cabrera (Cabrera) was a student at Central High School, which is located in downtown Los Angeles near the Third Street tunnel. In class, Bustamante and Salinas were staring at each other disrespectfully. Bustamante said, "We'll settle it after school." Salinas responded, "Then say no more." Salinas was a member of the Hangout Boys gang and Bustamante belonged to the MS gang. Bustamante was 16 years old. He warned Cabrera that "snitches get stitches."

Bustamante and Salinas met at the Third Street tunnel. Bustamante brought a handgun. Around 3:00 p.m., Cabrera was crossing near the entrance of the tunnel at Hill Street when she heard a gunshot, like an explosion, echoing in the tunnel. She heard or saw a second shot, then saw Bustamante fire his third shot at Salinas's head. One or two more gunshots sounded.

Bustamante was only 10 to 15 feet away from Salinas, who was unarmed. He had been shot five times. A crowd gathered nearby. Bustamante ran through the tunnel.

Cabrera approached a nearby police officer and told him the shooter was at the far end of the tunnel. Bustamante was arrested. In his sweatshirt's front pocket, Bustamante had a stainless steel revolver, which was the gun he used to shoot Salinas.

Salinas died of multiple gunshot wounds. He had been shot once in the back and thigh, twice in the abdomen, and once in the back of his head. At the police station, Bustamante initially told detectives that Salinas had been armed until he overpowered Salinas, removed the weapon, and shot him in self-defense. He said Salinas claimed affinity to his gang and challenged Bustamante to do the same. According to Bustamante, he told Salinas he did not "bang" but merely associated with gang members. Later, when told that a videotape did not depict his version of events, Bustamante responded, "F*** it, I'm going to tell you the truth."

DISCUSSION

I. The Gang Enhancement Was Properly Imposed on Bustamante's Conviction for Voluntary Manslaughter

The jury acquitted Bustamante of the murder of Munoz, convicting him instead of the lesser included offense of voluntary manslaughter. The jury found true the allegation that the manslaughter "was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members." For the gang finding, the trial court imposed a 10-year sentence enhancement pursuant to section 186.22, subdivision (b)(1)(C). Bustamante contends the enhancement must be stricken because it is inconsistent with the prosecution's theories of voluntary manslaughter.

The jury was instructed that to be guilty of voluntary manslaughter on a sudden quarrel or heat of passion theory, Bustamante must have "acted rashly and under the influence of intense emotion that obscured his [r]easoning or judgment." Bustamante argues that if his reasoning and judgment were so obscured by intense emotion, it is difficult to conceive how he could have acted with the specific intent to promote, further or assist in criminal conduct by gang members; he would have been acting "out of emotion, rather than for the gang."

The jury was also instructed that to be guilty of voluntary manslaughter on an imperfect self-defense theory, Bustamante must have "actually believed that he or someone else was in imminent danger of being killed or suffering great bodily injury" and "that the immediate use of deadly force was necessary to defend against the danger." He argues that if he acted under a belief that he needed to defend himself, or someone else, from an imminent danger of being killed or suffering great bodily injury, then he acted for the purpose of preserving life and not for a criminal purpose.

Bustamante concedes that inherently inconsistent verdicts are not normally invalidated because they may reflect an act of leniency or compromise. (*People v. Avila* (2006) 38 Cal.4th 491, 600; 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 76, pp. 110-111 [an inconsistency between a jury's verdict and finding on an enhancement allegation is permissible].) But he argues "that is not the case when, as here, the jury's verdict is the result of a mistake of law based upon a legally inadequate theory." Bustamante, however, cites no authority supporting his position that either of the prosecution's

two theories of voluntary manslaughter are legally inadequate to support a gang enhancement.

On the other hand, the People cite several cases in which a defendant received a gang enhancement on a manslaughter conviction. For example, in *People v. Vega* (2013) 214 Cal.App.4th 1387, 1395, having found the defendant's offense of attempted voluntary manslaughter to be a violent felony offense, the appellate court concluded "the trial court properly imposed a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C)." In *People v. Yang* (2010) 189 Cal.App.4th 148, 151, the appellate court noted that in its unpublished portion it found the evidence sufficient "regarding [defendant's] aiding and abetting of the voluntary manslaughter and a gang enhancement (§ 186.22, subd. (b)(1)(C).)" In *People v. Nicholes* (2016) 246 Cal.App.4th 836, 848–849, a gang enhancement to a voluntary manslaughter conviction was stricken only because the evidence was insufficient regarding a gang subset, not because a gang enhancement cannot be made in manslaughter cases. Indeed, the enhancement statute itself identifies manslaughter as a qualifying offense for "pattern of criminal gang activity." (§ 186.22, subd. (e)(3).)

Subdivision (b)(1) of section 186.22 applies to "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in *any criminal conduct by gang members*." (Italics added.) The jury could have rationally inferred that Bustamante acted in association with fellow gang member Solano with the intent to promote, further or assist Solano's assault of a gang rival, yet still have believed that self-defense was necessary. (See *People v. Guiton* (1993) 4

Cal.4th 1116, 1128–1129 [reversal not warranted where at least one valid theory remains].)

Put another way, we reject Bustamante's premise that the state of mind for imperfect self-defense and the specific intent required for a gang enhancement are mutually exclusive. "The basic rationale of the doctrine [of imperfect self defense] is that a genuine belief in the need to defend oneself, even if unreasonable, negates the 'malice aforethought' which is required for a conviction of murder." (*People v. Hayes* (2004) 120 Cal.App.4th 796, 801.) A gang enhancement, however, has no element of malice aforethought that would be negated by an honest but unreasonable belief in the need to defend oneself. Because the mental states for voluntary manslaughter and a gang enhancement are different, they are not mutually exclusive. A defendant can intend to act for the benefit of a gang and simultaneously act on the actual, but unreasonable, belief that he is in imminent peril.

II. Any Error in Giving Self-Defense Instructions Was Harmless

Solano contends the trial court committed prejudicial error and violated his constitutional right to due process by instructing the jury with "conflicting instructions [that] canceled out [his] right to use self-defense in response to the sudden and deadly counterattack, requiring reversal." Specifically, he points to CALCRIM No. 3471, which permits an aggressor to defend himself against a sudden and deadly counterattack,[5] and

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[5] The jury was instructed with CALCRIM No. 3471 as follows: "A person who engages in mutual combat or who starts a fight has a right to self-defense only if: [¶] 1. He actually and in good faith tried to stop fighting; [¶] AND [¶] 2. He indicated, by

CALCRIM No. 3472, which forecloses self-defense to someone who seeks a quarrel in order to create the need to act in self-defense.[6] We review a claim of instructional error de novo. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378.)

The People assert: "The surprising aspect of the charge to the jury is not the interplay between [CALCRIM] Nos. 3471 and 3472, but the fact that self-defense instructions were given at all. Solano simply did not rely on that defense." We agree. Solano never claimed that he shot Munoz in self-defense or that he shot Munoz at all. To the contrary, Solano testified that he was unarmed and he ran away from Munoz. Bustamante took the

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word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wanted to stop fighting and that he had stopped fighting; [¶] AND [¶] 3. He gave his opponent a chance to stop fighting. [¶] If the defendant meets these requirements, he then had a right to self-defense if the opponent continued to fight. [¶] However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting, or communicate the desire to stop to the opponent, or give the opponent a chance to stop fighting. Of course, if the opponent used only []non-deadly force, then defendant would not be entitled to use deadly force in response. [¶] A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose."

6 The jury was instructed with CALCRIM No. 3472 as follows: "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force."

stand and testified to being the shooter. In closing argument, Solano's counsel never argued that Solano acted in self-defense. A trial court must only instruct on an affirmative defense "'if it appears the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Boyer* (2006) 38 Cal.4th 412, 469.)

We need not address whether the trial court erred by giving self-defense instructions, however, because we find that any error was harmless under any applicable standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability standard for state law error]; *Chapman v. California* (1967) 386 U.S. 18, 24 [stricter beyond-a-reasonable-doubt standard for federal constitutional error].)

Despite Bustamante's attempt to take the blame, the evidence was overwhelming that Solano shot Munoz in cold blood and not out of self-defense. Numerous witnesses, unaffiliated with either gang, testified that they saw Solano chase Munoz; Solano fired at Munoz while Munoz was running away; Munoz fell to the ground, unarmed, and held up his hands in surrender; Solano looked around, walked over to Munoz, and unloaded his gun into Munoz, shooting him in the heart, abdomen and thighs, then fled the scene. The evidence showed that unarmed Munoz was shot 10 times. Under these circumstances, it is inconceivable that the jury would have believed any claim of self-defense. The jury not only rejected findings of the lesser crimes of manslaughter and attempted manslaughter, as Solano points out, it also rejected a finding of second degree murder. The only logical inference is that the jury found no basis in the evidence for

self-defense and any error in giving self-defense instructions caused no prejudice.

III. Evidence that Bustamante Committed the Salinas Murder Was Properly Admitted in Solano's Trial

Solano contends the trial court committed prejudicial error and violated his due process right by allowing the prosecutor to cross-examine Bustamante about the Salinas murder. Specifically, he argues the court should have excluded both the underlying facts of Bustamante's pending murder case and his conflicting statements to detectives about the shooting.

A. Relevant Background

Before Bustamante testified, Solano's attorney moved to exclude references to the Salinas murder, committed by Bustamante three days after the Munoz murder. The trial court denied the motion. It found no undue prejudice, explaining "there is nothing in the facts of that other murder that prejudices your client." The court also found the fact that Bustamante had first claimed self-defense in the Salinas murder case but then admitted to committing the murder was highly probative on the issue of Bustamante's credibility.

At trial, Solano's counsel concluded her direct examination of Bustamante by asking, "[A]ren't you in custody on another case?" He acknowledged that he was. Then counsel asked, "And so in that particular case you had another kind of altercation with somebody else; is that correct?" Bustamante replied "Yes," and the direct examination concluded.

On cross-examination, the prosecutor established that the charge in Bustamante's other case was murder, that it happened three days later, that someone had challenged him to a gang fight, and that Bustamante and the victim met in the Third

Street tunnel. Only when the prosecutor asked whether Bustamante had brought a gun to that fight did Solano's counsel raise relevancy objections, which were overruled. The prosecutor then established that Bustamante was asserting self-defense in both cases, even though he never saw a gun in the hands of either of his victims.[7]

B. Applicable Law

Under Evidence Code section 780, the "jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony," including his character for honesty and veracity and a statement made by him that is inconsistent with any part of his testimony. (Evid. Code, § 780, subds. (e) & (h).) The trial court's ruling on the admissibility of evidence to determine witness credibility is reviewed under the deferential standard of abuse of discretion. (*People v. Thornton* (2007) 41 Cal.4th 391, 428.)

Under Evidence Code section 352, the "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice." "'"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the

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[7] While the prosecutor tried to elicit from Bustamante what he told the detectives about his culpability in the Salinas murder, Bustamante repeatedly stated, "I'm not sure" and "I can't recall." It thus appears the statements about which Solano complains regarding Bustamante changing his story as to why he shot Salinas are taken largely from Bustamante's recorded statements to the detectives that were played for the jury during the prosecutor's rebuttal.

issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.]" (*People v. Williams* (2013) 58 Cal.4th 197, 270.) "'Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" [Citation.]" (*People v. Dement* (2011) 53 Cal.4th 1, 36, overruled in part on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Eubanks* (2011) 53 Cal.4th 110, 144.) Once again, the trial court's decision whether to admit evidence will not be disturbed on appeal absent a clear showing of abuse. (*People v. Thomas* (2011) 51 Cal.4th 449, 485; *People v. Goldman* (2014) 225 Cal.App.4th 950, 959.)

C. Analysis

Solano concedes the "prosecutor was entitled to cross-examine Bustamante to challenge his credibility" by eliciting testimony that he had two pending murder cases and that he changed his statements about the murders. Solano nonetheless argues that "[a]ny probative value of the evidence to Bustamante's credibility was far outweighed by the prejudicial effect upon appellant." We disagree. While evidence that Bustamante had been charged with another, unrelated murder may have been somewhat prejudicial to Solano, Solano has not shown that such evidence was *unduly* prejudicial. Nothing in Bustamante's testimony implicated Solano in the Salinas murder. Bustamante had only been charged with, not convicted of, the Salinas murder. And the jury had already heard from the prosecution's gang expert that one of the primary activities of Solano's gang was murder. Nothing Bustamante said posed an intolerable risk to the fairness of the trial. To the contrary, any prejudice caused by evidence of the Salinas murder or what

Bustamante may have said to detectives about it was nothing more than the ordinary prejudice of having a witness impeached.

Solano argues that because the basis for the trial court's decision to sever appellants' trials in the first place was the potential prejudice from Bustamante's additional charge of murder, the court's "about-face" during Solano's trial deprived Solano of due process. We find no due process violation. Solano discusses the "spillover" effect of improperly joining offenses, noting "the danger that the jury here would aggregate all of the evidence . . . and convict on both charges in a joint trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 453, superseded by statue on other grounds as stated in *People v. Jones* (2013) 57 Cal.4th 899, 927.) But, here, only Bustamante was charged with the Salinas murder. There was no danger the jury would convict Solano of the Munoz murder in order to ensure that he was held responsible for at least one murder. Indeed, the jury acquitted Solano of the attempted murder of Alvarez. We agree with the People that had the trial court known that Bustamante was going to testify for Solano, it likely would not have severed the case. As the court told Solano's counsel, "I severed the case for you but you're injecting Mr. Bustamante back into the case." The prosecutor was entitled to impeach Bustamante and did so in a way that was not unduly prejudicial to Solano.

IV. Evidence That Solano Possessed a Firearm Was Properly Admitted

Solano contends the trial court committed prejudicial error and violated his constitutional right to due process by admitting evidence that he possessed a firearm not linked to the charged crimes.

The weapon used to shoot Munoz was never recovered. When police arrested Solano on December 13, 2011, two months after the Munoz murder, they seized his cell phone, which contained a video showing him firing a gun out of a window. A prosecution expert had concluded the video was shot on November 12, 2011, one month after the murder. During trial, the prosecutor sought admission of the video recording and an expert's opinion that the weapon was a semiautomatic nine-millimeter handgun. Solano's counsel objected that the evidence was prejudicial. The court watched the video and deferred ruling on its admissibility. Later, the court determined that whether the gun in the video was the same one used in the murder was a factual issue for the jury. A detective then testified that the gun Solano fired in the video appeared to be a nine-millimeter Beretta, the same caliber of the weapon used to murder Munoz.

Solano makes two arguments as to why the evidence was inadmissible. First, he argues the evidence was inadmissible under Evidence Code section 1101, subdivision (b), which provides that evidence a person "committed a crime, civil wrong, or other act" is admissible when "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." Solano argues the evidence "served only to reinforce [his] violent nature and criminal propensity." Such arguments have been rejected. In *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052, testimony that the defendant showed a witness a gun that "'look[ed] like'" the murder weapon "did not merely show that defendant was a person who possesses guns, but showed he possessed a gun that might have been the murder weapon after the first and before the

last of the killings. The evidence was thus relevant and admissible as circumstantial evidence that he committed the charged offenses." (See *People v. Homick* (2012) 55 Cal.4th 816, 877 [evidence that defendant habitually carried a revolver admissible]; *People v. Cox* (2003) 30 Cal.4th 916, 957, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [guns found in search of defendant's car admissible because they were relevant as possible murder weapons].)

Second, Solano argues that "[e]ven if there was any relevance to the evidence, its probative value was so minimal in comparison to [its] prejudicial effect, that it should have been excluded under Evidence Code section 352." "On the prejudice side of the scale, we are concerned only with the possibility of an emotional response to the proposed evidence that would evoke the jury's bias against defendant as an individual unrelated to his guilt or innocence." (*People v. Gunder* (2007) 151 Cal.App.4th 412, 417.) We discern no undue prejudice from the evidence and find no abuse of discretion on the part of the trial court in admitting it.

V. Proposition 57

Appellants contend that because they were minors at the time of their crimes, Proposition 57 requires remand of their case to the juvenile court to conduct a fitness or transfer hearing to determine whether their case should proceed in juvenile or adult court. In *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 304 (*Lara*), the California Supreme Court concluded the relevant portions of Proposition 57 apply retroactively "to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Id.* at p. 304.) Because appellants'

judgments of conviction are not yet final, their Proposition 57 claim is well taken.

We noted that Bustamante was 16 years old on the dates of the crimes in October 2011 and now is 23 years old. Solano was 17 years on the dates of the crimes and now is 25 years old. In light of appellants' ages and the fact they have been in custody for nearly seven years on the charged crimes, we asked the parties for further briefing on the issues of whether the juvenile court had jurisdiction to conduct a transfer hearing and whether such a hearing was even feasible here. The parties' somewhat incomplete responses demonstrate the complexity and challenges of holding a transfer hearing under the circumstances here. However, *Lara* concluded the "potential complexity in providing juveniles charged directly in adult court with a transfer hearing is no reason to deny the hearing." (*Lara, supra*, 4 Cal.5th p. 313.)

Juvenile court jurisdiction is a function of the age of the defendant at the time of the offense. (Welf. & Inst. Code, § 602.) While appellants' ages would normally require their release from custody (Welf. & Inst. Code, § 1769), "there are provisions allowing appropriate authorities to petition to keep a youthful inmate committed under Section 602 in custody longer—up to 'the maximum term prescribed by law for the offense of which he or she was convicted'—based on concerns about public safety and dangerousness.' (Welf. & Inst. Code, §§ 1780, 1782.)" (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 611, overruled on other grounds in *Lara, supra*, 4 Cal.5th at pp. 314–315.)

We must follow *Lara,* which approved the procedure set forth in *People v. Vela* (2017) 11 Cal.App.5th 68, 72 (*Vela*). Accordingly, we conditionally reverse appellants' convictions and sentences and remand the case to the juvenile court for a transfer

hearing wherein the court shall determine appellants' fitness for treatment within the juvenile justice system. (Welf. & Inst. Code, § 707.) If appellants are found unfit for juvenile court treatment, the case shall be transferred to adult court and their convictions and sentences shall be reinstated. (Welf. & Inst. Code, § 707.1, subd. (a).) If appellants are found fit for juvenile court treatment, the juvenile court shall treat their convictions as juvenile adjudications and impose an appropriate juvenile disposition after a dispositional hearing. (Welf. & Inst. Code, §§ 602, 702, 706.)

VI. Senate Bill No. 620

In supplemental briefing, appellants contend the passage of Senate Bill No. 620 requires remand so that the trial court may exercise its newfound discretion regarding the imposition of sentence for their firearm enhancements (§§ 12022.5, subd. (c), 12022.53, subd. (h)), which was previously mandatory. The People agree that Senate Bill No. 620 applies retroactively to all nonfinal judgments. However, the People contend that no purpose would be served by a remand here because no reasonable court would exercise its discretion to strike the firearm enhancements. Because we are already remanding the case, it is appropriate to allow the trial court to exercise its discretion on the firearm enhancements. Our conclusion does not suggest any opinion on the manner in which the trial court should exercise its discretion.

DISPOSITION

We conditionally reverse appellants' convictions and sentences and remand the matter to the juvenile court for a transfer hearing wherein the court shall determine appellants' fitness for treatment within the juvenile justice system. (Welf. & Inst. Code, § 707.) If appellants are found unfit for juvenile court treatment, the case will be transferred to adult court and their convictions reinstated. The court will then exercise its discretion whether to strike the sentences for the firearm enhancements. If appellants are found fit for juvenile court treatment, the juvenile court is ordered to treat their convictions as juvenile adjudications and impose an appropriate juvenile disposition after a dispositional hearing. (Welf. & Inst. Code, §§ 702, 602 [wardship determination], 706 [disposition hearing].)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT